EX PARTE OR LATE FILED

Association for Local Telecommunications Services

February 22, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **Notice of Ex Parte Presentation** in CC Docket 96-98/Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

Dear Secretary Salas,

On February 16, 1999, I faxed the attached two pages to Jake Jennings of the Policy Division of the Common Carrier Bureau for the Commission's consideration in the Commission's review of the unbundled network elements that must be provided to competitive carriers by incumbent carriers in light of the Supreme Court's vacation of Rule 51.319 in AT&T v. Iowa Utilities Board.

Pursuant to Section 1.1206(b) of the Commission's Rules we are submitting and original and one copy of this ex parte for inclusion in the above-referenced proceeding. In addition could you please date-stamp the extra enclosed copy and return it to me in the self-addressed stamped envelop. Should you have any questions about this matter, please call me at 969-2585.

Sincerely,

Emily M. Williams

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cc: Jake Jennings

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DISCUSSION OF THE "NECESSARY" AND "IMPAIR" STANDARDS AND SOME PROPOSED QUESTIONS FOR THE FCC'S PUBLIC NOTICE IN RESPONSE TO THE SUPREME COURT DECISION IN AT&T CORP. V. IOWA UTILITIES BOARD FEBRUARY 12, 1999

The definition of "proprietary in nature" should be extremely narrow. The purpose of the Telecommunications Act of 1996 is to allow three modes of competitive entry -- by resale, by using unbundled elements, or by building separate facilities. Allowing certain elements to be excluded from the list of elements made available under subsection (c)(3) because they are "proprietary" could effectively eliminate use of unbundled elements as a viable entry strategy. Thus, the term "proprietary" should not be read to mean "elements in which the ILEC has an ownership interest", because the ILEC "owns" its entire network. Equating "proprietary" with "ownership could allow the ILEC to avoid making any elements of its network available (unless found to be "necessary"). Similarly, a network element is not "proprietary in nature" if it contains databases or information that adheres to open industry or Bellcore standards. The term "proprietary" should instead describe a unique component of the ILEC network that has been deployed by the ILEC and noone else. This approach would analogize the word "proprietary" to a patented or copyrighted product or service. The term "proprietary" should not, however, apply to elements of the ILEC network that are commonly deployed by other ILECs or CLECs.

"Necessary" elements are those that an entrant requires to provide telecommunications services comparable to those the ILEC is currently offering, or is capable of offering, and that the entrant can neither reasonably replicate in the near term nor purchase from a source other than the ILEC. Thus, even if a particular element is "proprietary", the element may still be "necessary" and thus made available under (c)(3) if noone other than the ILEC can deploy a comparable facility or service. In deciding whether a network element cannot be reasonably replicated or purchased, the Commission shall consider availability, cost, quality, timeliness of implementation and any other factors (such as the need to access public or private rights of way) that would affect the requesting carriers' ability to replicate or purchase the element.

Furthermore, the Commission need only "consider" whether proprietary network elements are "necessary". The Commission could find that an element is "proprietary", find that it is not "necessary", but still conclude that the element must be made available pursuant to subsection (c)(3) if it decides that, to promote competition and the purposes of the Act, that the element should be provided. For instance, in an element is "proprietary" and not "necessary", the Commission may still find that the element should be made available if the requesting carrier's use of the element would not infringe upon the ILEC's proprietary interest. In other words, some CLECs simply ask to interconnect with an element in a manner that does not reveal to the CLEC the protected ILEC interest in how that element functions. Oftentimes, the CLEC may not know, and may not care about, the unique technical specifications of the element. In this case, there may be no violation of the ILEC's "proprietary" interest if it makes that element available to the CLEC.

A carrier is "impaired" if the carrier's inability to obtain an element would hinder the entrants' ability to offer services at a price and level of quality that will allow it to compete with the ILEC.

"Impair" means to make worse or diminish. Thus, the "impair" standard would require many, if not all, of the network elements of the ILEC to be provided. Even if a CLEC could obtain a similar element from someone other than the ILEC, the ILEC must still make the element available if the ILEC offers a functionality, or price, or other feature that is not as good as that offered by the non-ILEC. On the other hand, if CLECs can routinely obtain an element from the non-ILEC that is of the same or better quality than that provided by the ILEC, the ILEC should not be required to make that element available. For instance, almost every facilities-based CLEC is today deploying its own switches. In most major markets, the ILEC's failure to make its switching available to CLECs as an unbundled element does not "impair" the ability of competitors to offer competitive service. Thus, the Commission should consider finding that the ILECs do not need to make the switching element available to CLECs under subsection (c)(3).

Proposed Questions

Does the provision of access to a network element require an incumbent to furnish access to proprietary information?

Should access to an ILEC-provided UNE be deemed Anecessary@ if the entrant cannot duplicate the offering in the near term by purchasing the element from another source at a price and quality that is reasonably comparable to [or not materially different from] the UNE provided by the ILEC?

Should the Commission conclude that failure to provide access to a UNE would not "impair" the ability of requesting carrier if the carrier is able to purchase the element from another source at a price, quantity and quality that are so close to the ILEC-provided UNE that any differences are de minimis?

Should determinations of when access to unbundled elements is required under Section 251(d)(2) be made on a national basis rather than on a geographically specific basis in order to promote the goals of the Act?

If the record will not support a finding that a network element is available ubiquitously in a state, should the FCC require an incumbent LEC to offer to provide access to the element throughout the state?

What is the meaning of the term "shall consider" within Section 251(d)(2)? May the Commission require the availability of network elements without concluding that such elements, if proprietary, are necessary, and if not proprietary, that unavailability of such elemnts would impair a requesting carrier's ability to provide service? If so, under what circumstances? For example, might the Commission conclude that a UNE should be available on a national basis even though there might be some urban areas in which a carrier could obtain a competitive alternative in the near term at comparable price and quality?